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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CHARLES E. HILL, ex rel on behalf of the United States of America, In Pro Per, Plaintiff, v. HARVARD UNIVERSITY, an unknown entity; MARK ZUCKERBERG, an individual; EDUARDO SAVERIN, an individual; and DUSTIN MOSKOVITZ, an individual, ANDREW MCCOLLUM, an individual, CHRISTOPHER HUGHES, an individual, FACEMASH, an unknown entity; FACEBOOK, INC., a Delaware Corporation, and DOES 1-30, inclusive, Defendants.	Case No. 2:17-cv-01145-PA-FFM **ZUCKERBERG'S, MOSKOVITZ'S, MCCOLLUM'S AND FACEBOOK'S NOTICE OF MOTION AND MOTION TO DISMISS** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** Date: October 2, 2017 Time: 1:30 p.m. Dept: Courtroom 9A Judge: Hon. Percy Anderson Date Filed: February 13, 2017 Filed Concurrently with: 1. Declaration of Maya Karwande 2. Proposed] Order

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NOTICE OF MOTION AND MOTION

TO THE RELATOR CHARLES E. HILL, PLEASE TAKE NOTICE that on October 2, 2017 at 1:30 p.m.,[1] in Courtroom 9A, 9th Floor of the above-captioned Court, located at 350 W. 1st Street, Los Angeles, California 90012, or as soon thereafter as counsel may be heard, Defendants Mark Zuckerberg, Dustin Moskovitz, Andrew McCollum, and Facebook, Inc. ("Facebook Defendants"), will and hereby do jointly move for an Order dismissing Relator's Complaint with prejudice.

Relator's Complaint against the Facebook Defendants must be dismissed under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The pre-2010 version of the False Claims Act ("FCA")'s public disclosure bar governs this action and deprives the court of subject matter jurisdiction. 31 U.S.C. § 3730(e)(4)(A) (1986 ed.). The FCA claim is also barred by the statute of limitations. Even if the Complaint could overcome these barriers, the allegations fail to allege a FCA claim with sufficient particularity or plausibility to survive a motion to dismiss. Likewise, the allegations in the Complaint fail to state an "unjust enrichment" claim. Recovery for a relator is governed by § 3730(d) of the FCA; there is no opportunity for independent relief. The claim also fails as a stand-alone "unjust enrichment" claim because there are no allegations that Relator conferred any benefit to Facebook Defendants—a fundamental element of the claim.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the Declaration of Maya Karwande and attached exhibits, the Notice of Motion and Motion and associated Memorandum of Points and Authorities submitted by President and Fellows of

[1] On August 21, 2017, the Court granted Facebook Defendants' and Harvard University's joint request to notice the hearing on the motion to dismiss on October 2, 2017. Dkt. No. 40.

Harvard College (sued as Harvard University), which Facebook Defendants join and incorporate by reference as if fully set forth herein, and such other submissions or arguments as may be presented to the Court at or before the hearing.

LOCAL RULE 7-3 CERTIFICATION

Facebook Defendants' counsel attempted to confer with Relator Mr. Charles Hill pursuant to L.R. 7-3. On Sunday August 13, 2017, Counsel inquired via email whether Mr. Hill was available to confer the following day. Declaration of Maya Karwande ("Karwande Decl.") ¶ 2, Ex. A. On August 14, 2017, Mr. Hill responded in correspondence that "there will be no conference on Monday to discuss any motion you intend to file for your clients." *Id.* ¶ 3, Ex. B. The same day, Counsel responded and asked Mr. Hill if there was another time that was more convenient to confer. *Id.* ¶ 4, Ex. C. Mr. Hill did not respond to this message. *Id*. On August 16, 2017, Counsel again inquired as to Mr. Hill's availability to meet and confer. *Id.* ¶ 5, Ex. C. Mr. Hill did not respond to this email. On August 17, 2017, Counsel called Mr. Hill and attempted to meet and confer. *Id.* ¶ 6. Mr. Hill stated that he was not interested in discussing the substance of the motion. *Id.* On August 17, 2017, Counsel emailed Mr. Hill and indicated a willingness to meet and confer if Mr. Hill changed his mind. *Id.*, Ex. C. Mr. Hill responded by confirming he was not interested in conferring and attached a letter stating "I do not plan on holding a meet and confer regarding any motions to dismiss until the court makes a ruling on this illegal and unethical behavior of Mr. Zuckerberg." *Id.* ¶ 7, Ex. D.

Dated: August 21, 2017

KEKER, VAN NEST & PETERS LLP

By: */s/ Paven Malhotra*
PAVEN MALHOTRA
MAYA KARWANDE

Attorneys for Defendants
MARK ZUCKERBERG, DUSTIN MOSKOVITZ, ANDREW MCCOLLUM and FACEBOOK, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

If the yarn spun by Charles Hill ("Relator") sounds like the plot of a movie script, that should come as no surprise. It is. After watching the film "The Social Network," reading the book on which the film was adapted,[2] viewing the Department of Education's website, and reading an article from *The Crimson*, Harvard's student newspaper, Relator claims to have uncovered a sinister plot of Hollywood proportions: a fourteen-year old conspiracy by Harvard University and Mark Zuckerberg to defraud the federal government.

According to Relator, his sleuthing uncovered the following: Back when he was still a college student in 2003, Mr. Zuckerberg allegedly burglarized and then hacked into the computer network of three Harvard dorms to gather student photos for "Facemash," an alleged precursor to Facebook. Dkt. No. 1 ("Compl.") ¶¶ 13-15. Harvard disciplined Mr. Zuckerberg but did not suspend him. *Id*. ¶ 14. Relator alleges that the *following* year Mr. Zuckerberg created the website and company eventually known as Facebook. *Id*. ¶ 16.

The Department of Education requires colleges and universities that receive financial aid to maintain and report information about certain crimes on campus. Notably, although burglary is such a crime, computer hacking is not. *See* 20 U.S.C. § 1092(f)(1)(F). According to Relator, Harvard's report for the 2003-2004 school year did not report any burglaries from the October to November 2003 timeframe. Relator alleges that Harvard made the decision not to report these alleged "crimes" to the Department of Education. Harvard's rationale: It knew that one day Mr. Zuckerberg would strike it rich and build a successful company, and Harvard "wanted a piece of this action." Compl. ¶ 15.

The Complaint does not allege that the individual defendants—all of whom

[2] Ben Mezrich, *The Accidental Billionaires: The Founding of Facebook: A Tale of Sex, Money, Genius and Betrayal* (2009).

were college students at the time—knew that the Department of Education had reporting requirements, discussed those reporting requirements with anyone at Harvard, or even saw Harvard's crime statistics submissions. Indeed, one of the defendants—Facebook, Inc.—did not even exist in 2003. Nevertheless, Relator baldly alleges that the Defendants somehow "engaged in a conspiracy to block the release of the information on the burglaries." Compl. ¶ 38. As for that big "payout" that Harvard was expecting, the Complaint concedes that Harvard is still waiting for it fourteen years later.

Upon unearthing this plot, Relator ran to the federal government—the supposed victim of Harvard and Mr. Zuckerberg's machinations—to inform it of the alleged fraud. The government's response: a shrug. It declined to intervene in this *qui tam* lawsuit.

Though the fantastic allegations in the Complaint can be disproved on the merits, this Court need not get there. Instead, far more pedestrian problems doom Relator's suit from the outset.

Defendants Facebook Inc., Mark Zuckerberg, Dustin Moskovitz, and Andrew McCollum ("Facebook Defendants") move to the dismiss Relator's Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. Relator's claims are barred by the public disclosure bar—which deprives the court of subject matter jurisdiction—and also under the statute limitations. Even if the claims could overcome these barriers, the allegations plainly lack the plausibility and particularity to survive a motion to dismiss under the heightened pleading standard for fraud. Relator has failed to allege Facebook Defendants committed any violation of the False Claims Act—by submitting a false claim to the government or making a false statement that is material to the false claim. And as for the conspiracy allegations, Relator pleads nothing to establish such conspiracy was plausible. Indeed, Facebook Defendants are not alleged to have played *any* role or even had any knowledge of any statement or claim Harvard made to the federal government. Given the lack of subject matter jurisdiction and the numerous other deficiencies in the Complaint, Relator's claims cannot be saved and must be dismissed with prejudice.

II. BACKGROUND[3]

In April and May of 2013, Relator watched the movie *The Social Network*[4] and read the book that inspired it, *The Accidental Billionaires: The Founding of Facebook*. Compl. ¶ 34. Three years later, in November 2016, Relator learned that the Department of Education fined Penn State for failing to report various crimes on campus. *Id.* ¶ 35. These fines were imposed because of violations of a federal law—the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")—that requires colleges and universities to report certain crimes each year. The following month, Relator visited a government website and downloaded some of Harvard University's publicly available campus crime reporting data from 2003. *Id.* ¶ 36.

Based entirely on these admittedly "unverified" public sources, Relator alleges that Mr. Zuckerberg committed "burglaries" of three Harvard student dormitories, "hacked" into the computer system for three dorms, and "hacked" into Harvard's main computer system. Compl. ¶¶ 13-14, 28, 33. The ***only*** support the Complaint cites for the alleged burglaries is the book *The Accidential Billionaires*. *See* Compl. ¶¶ 32-33. In a prior filing to this Court, Relator described that book as a work of "fiction." *See* Dkt. No. 29 at 5, n.1.

The Complaint asserts that Mr. Zuckerberg allegedly used the "stolen" data to create a website called Facemash. *Id.* ¶ 15. Harvard disciplined Zuckerberg but did not suspend him. *Id.* ¶ 14. According to Relator, in 2004 Facemash was "relaunched" as Facebook. *Id.*

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[3] For the purposes of this Motion only, Facebook Defendants acknowledge that the Court should assume the truth of well-pleaded facts for the purposes of this motion. *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007).

[4] *The Social Network*. Dir. David Fincher. Columbia Pictures, 2010.

Harvard University submitted reports to the Department of Education as required under the Clery Act. The report for the 2003-2004 school year did not mention any disciplinary hearings for crimes committed in student housing in 2003. *Id.* ¶ 36. The Complaint alleges Harvard did not report the "burglaries" because it knew that Facemash would one day be a financial success and "wanted a piece of the action." *Id.* ¶¶ 15-16. Thirteen years later, Mr. Zuckerberg discussed the possibility of making a donation to Harvard University. *Id.* ¶ 17. To date, that donation has not occurred. *Id*.

Although the Complaint makes a few allegations against Mr. Zuckerberg, it pleads next to nothing about corporate defendant Facebook, Inc. and individual defendants Mr. Moskovitz and Mr. McCollum. Indeed, all that is offered is that "On information and belief, Moskovitz, McCollum and Hughes knew or should have known that Zuckerberg committed three burglaries to obtain the missing data." *Id.* ¶ 30. Relator never explains why these defendants should have known anything—or why that even matters. Nonetheless, Relator lumps all defendants together and asserts—without support—that all defendants are co-conspirators. *Id*. ¶ 7.

In 2017, Relator filed this *qui tam* False Claim Act suit. Relator asserts that Harvard should be fined and *all* of Facebook's assets should be placed in a constructive trust. Compl. at 25. The Government has declined to intervene, and the Complaint became public on June 6, 2017. Dkt. No. 27.

On June 9, 2017, the Court ordered Relator to show cause as to why the Court has subject matter jurisdiction over the False Claims Act claim despite the public disclosure bar, which prohibits lawsuits where the information underlying the Complaint has already been publicly disclosed. Relator's response, filed on June 20, 2017, affirms that his Complaint is based solely on publicly available sources and provides no viable argument to overcome the bar. *See* Dkt. No. 29.

III. LEGAL STANDARD

Facebook Defendants move to dismiss this action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. Under Rule 12(b)(1), a complaint must be dismissed if the Court does not have jurisdiction over the matter on the face of the pleadings. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). When, as here, the defendant claims "that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction," the Court treats the challenge as "any other motion to dismiss on the pleadings for lack of jurisdiction." *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (internal quotations and citations omitted). Relator must allege jurisdiction with "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (applying Rule 8 to 12(b)(1) motion to dismiss).

To survive a 12(b)(6) motion to dismiss for failure to state a claim, a False Claims Act Complaint must comply with Rule 8(a)'s plausibility requirement. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). "[C]laims of fraud or mistake—including FCA claims—must, in addition to pleading with particularity, also plead ***plausible allegations***." *Id*. (emphasis added). Mere "labels and conclusions and a formulaic recitation of a cause of action's elements" will not suffice. *Twombly*, 550 U.S. at 545. Rather, "the pleading must state 'enough fact[s] to raise a ***reasonable expectation that discovery will reveal evidence of [the misconduct alleged]***.'" *Cafasso*, 637 F.3d at 1055 (quoting *Twombly*, 550 U.S. at 556) (emphasis added). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545.

"Because the False Claims Act is an anti-fraud statute," Relator must also meet the "heightened pleading requirement" of Rule 9(b) of the Federal Rules of Civil Procedure. *See Bly-Magee v. Cal.*, 236 F.3d 1014, 1018 (9th Cir. 2001). Relator must "state with particularity the circumstances constituting [the] fraud" and must identify "the who, what, when, where, and how of the misconduct charged." *Ebeid ex rel. U.S. v. Lungwitz,* 616 F.3d 993, 998 (9th Cir. 2010) (internal quotations and citations omitted).

Relator has conceded that his complaint must satisfy both Rule 8 and Rule 9(b)'s requirements to avoid dismissal. *See* Dkt. No. 29 at 4.

IV. ARGUMENT

The Facebook Defendants vigorously contest Relator's suggestion that they committed *any* crimes, that they sought to cover up crimes, and that they conspired with Harvard to defraud the federal government. The Court need not and cannot wade into the merits because it lacks subject matter jurisdiction to entertain this suit. And even if it had such jurisdiction, the Complaint is time-barred and fails to state a claim.

A. This Court lacks subject matter jurisdiction over Relator's False Claims Act suit under the public disclosure bar.

Based on his review of a book, movie, newspaper, and website, Relator alleges that *all* Defendants violated three provisions of the False Claims Act by: (a) certifying in 2003 that Harvard was in compliance with the Clery Act; (b) making a false statement that was material to a false or fraudulent claim by certifying that no burglaries occurred at Harvard in 2003; and (c) engaging in a conspiracy to block the release of the information about the alleged 2003 burglaries. Compl. ¶ 38.

The FCA's public disclosure bar deprives the Court of subject matter jurisdiction and requires dismissal of Relator's Complaint. Section 3730(e)(4)(A) of the FCA, which contains the bar, prohibits *qui tam* actions that are based on information that has already been made public, either through certain types of government sources or the "news media," unless the relator is an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A).

A FCA claim is governed by the version of the public disclosure bar in effect at the time the allegedly fraudulent conduct occurred. *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 947 (1997). Until 2010, the public disclosure bar deprived the court of subject matter jurisdiction over any claim based on such publicly disclosed information. *See* 31 U.S.C. § 3730(e)(4)(A) (1986 ed.); *Malhotra v. Steinberg*, 770 F.3d 853, 857 (9th Cir. 2014). In 2010, Congress amended the public disclosure bar and removed the jurisdictional language. 31 U.S.C. § 3730(e)(4)(A). Under the 2010 version, the public disclosure bar ***still requires dismissal***, but does so directly, rather than depriving the court of jurisdiction.

The public disclosure bar requires a two-step inquiry. First, a court "must determine whether there has been a prior public disclosure of the allegations or transactions underlying the *qui tam* suit." *A-1 Ambulance Serv., Inc. v. Cal.*, 202 F.3d 1238, 1243 (9th Cir. 2000) (internal citations omitted). If there has been such a public disclosure, the court must then determine whether the relator is an "original source," as defined in the statute. If the relator is not the "original source," the court lacks jurisdiction and the *qui tam* action must be dismissed. *Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992) (Because "[fe]deral courts have no power to consider claims for which they lack subject-matter jurisdiction", the Court "must examine whether [Relator's] claims are blocked by the jurisdiction bar of section 3730(e)(4) before [it] can consider *any* other question.") (emphasis added).

The public disclosure bar serves an important public policy purpose: avoiding payment to relators who confer no benefit on the government. In enacting the bar, Congress attempted to strike a balance between "adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *U.S. ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996). The purpose of the public disclosure bar is to stop lawsuits like this one, "[w]here the information underlying the relator's complaint has already been publicly disclosed [and] the government receives no additional benefit from the relator's filing of a *qui tam* suit." *U.S. ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 522 (9th Cir. 1999). Accordingly, the "public disclosure" test is not intended to be difficult to meet. *U.S. ex rel. Unite Here v. Cintas Corp.*, No. C 06-2413 PJH, 2007 WL 4557788, at *13 (N.D. Cal. Dec. 21, 2007).

1. The pre-2010 version of the public disclosure bar governs this action.

As the Court noted in its June 9, 2017 Order to Show Cause, the pre-2010 version of the statute applies because all of the allegedly fraudulent activity in the Complaint took place from 2003-2004. Dkt. No. 28 at 1-2. Relator's arguments to the contrary in his Response to the Order to Show Cause, Dkt. No. 29, are unavailing.

First, Relator argues that the 2010 version of the statute applies to the entire False Claims Act ("FCA") action because he has alleged an "ongoing" conspiracy. Dkt. No. 29 at 2. But Relator's boilerplate and conclusory allegations are not sufficient to allege any ongoing fraudulent conduct. Indeed, Relator has not alleged any false claim was submitted to the government any time after 2003-2004. Nor has Relator alleged that any fraudulent statements were made after that period. Relator's single allegation that post-dates that period is that Mr. Zuckerberg and Harvard University discussed a possible donation in 2016. Compl. ¶ 17. This allegation, even if coupled with the conclusory allegation of an "ongoing conspiracy," does not meet the heightened pleading standard for fraud under Rule 9(b). Compl. ¶¶ 7, 8. There are no allegations of the "who, what, when, where, [or] how" of this supposed meeting. *Ebeid*, 616 F.3d at 998. The allegations also fail Rule 8(a)'s plausibility requirement. It is completely implausible that Harvard, Mr. Zuckerberg, Mr. Moskovitz, Mr. McCollum, and Facebook—an entity that did not even exist in 2003—entered into this conspiracy in 2003, and then waited thirteen years to even discuss the financial benefits that supposedly motivated the entire scheme. Indeed, these "financial benefits" are not even alleged to have been paid. Compl. ¶ 17.

Moreover, even if Relator had adequately pled a continuing conspiracy, the pre-2010 version of the statute still applies to any alleged conduct that took place in 2003. The Court must apply the version of the False Claims Act in effect at the time of the alleged fraudulent conduct. *See Hughes*, 520 U.S. at 947; *U.S. ex rel. Bloedow v. Planned Parenthood of the Great Nw. Inc*, 654 F. App'x 335, 335, n.1 (9th Cir. 2016). When alleged fraudulent occurrences take place both before and after 2010, courts apply two different versions of the statute. *U.S. ex rel. Savage v. CH2M Hill Plateau Remediation Co.*, No. 4:14-CV-5002-EFS, 2015 WL 5794357, at *10 (E.D. Wash. Oct. 1, 2015); *see also U.S. ex rel. Judd v. Quest Diagnostics Inc.*, 638 F. App'x. 162, 165 (3d Cir. 2015) (affirming this practice in the Third Circuit); *U.S. v. Catholic Health Sys. of Long Island Inc.*, No. 12-CV-4425 (MKB), 2017 WL 1239589, at *11 (E.D.N.Y. Mar. 31, 2017) (same approach in the Second Circuit). Accordingly, under any interpretation, the public disclosure bar is a jurisdictional issue for all conduct that occurred prior to 2010.

As for the only event that allegedly occurred after 2010—the supposed negotiation of a donation by Mr. Zuckerberg to Harvard in 2016—this completely fails Rule 9(b)'s heightened pleading requirement. Relator pleads nothing to suggest this discussion had anything to do with an alleged prior agreement not to disclosure the alleged burglaries to the Department of Education thirteen years earlier. And, as Relator concedes, no donation has even occurred. Thus, there is nothing to suggest this alleged 2016 conversation constituted an "overt act" in furtherance of a conspiracy to commit a False Claims Act violation. And, of course, this allegation has nothing to do with the other named Defendants—Facebook, Inc., Mr. Moskovitz, and Mr. McCollum.

2. Relator's claim is based on publicly available information.

Courts follow a two-step process to determine whether the "allegations and transactions" underlying a FCA *qui tam* suit have already been publicly disclosed. First, the court determines whether the public disclosure occurred through "a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media."[5] 31 U.S.C. § 3730(e)(4)(A) (1986 ed.); *A-1 Ambulance Serv.*, 202 F.3d at 1243. If there has been public disclosure through one of these sources, the court determines whether the "content of the disclosure consisted of the allegations or transactions giving rise to the relator's claim." *A-1 Ambulance*, 202 F.3d at 1243 (internal quotation omitted).

This is not a typical *qui tam* case where the relator has some connection to the underlying allegations and thus can serve as a source of information. Mr. Hill is not an employee or vendor or confidant of a wrongdoer. He is a licensed attorney living in Pomona, California who it appears has never met much less had a conversation with any of the Facebook Defendants. Indeed, Relator does not dispute that his *qui tam* action arises from information that was publicly available: a book, movie, newspaper articles, and data on a public government website. These sources all fall within the "broad sweep" of the "news media" prong of the public disclosure bar. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408 (2011). Indeed, courts have interpreted this prong to include all "[i]formation publicly available on the Internet." *U.S. ex rel. Hong v. Newport Sensors, Inc.*, No. SACV 13-1164-JLS (JPRx), 2016 WL 8929246, at *5 (C.D. Cal. May 19, 2016). Even though, as Relator concedes, *The Accidental Billionaires* is a work of fiction, the "hacking" allegations in the book that Relator relies upon in his Complaint were also covered in the news media. *See* Compl. ¶13 (citing November 18, 2003 *Harvard Crimson* article); Dkt. No. 29 at 5.[6]

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[5] Under the 2010 amendments, the sources listed were modified to read as follows: (i) in a *Federal* criminal, civil, or administrative hearing *in which the Government or its agent is a party*; (ii) in a congressional, Government Accountability Office, *or other Federal* report, hearing, audit, or investigation; or (iii) from the news media. *Compare* 31 U.S.C. § 3730(e)(4)(A) (1986 ed.) *with* 31 U.S.C. § 3730(e)(4)(A). These changes are not applicable here, and even if they were they do not have a material impact on the application of the public disclosure bar in this case.

Relator argues that he was the first person to put together the information and "connect[] all of these events together." Dkt. No. 29 at 6. But "the elements of the fraud allegation [or transaction] need not have been made public in a single document" for the purposes of the public disclosure bar. *U.S. ex rel. Haight v. Catholic Healthcare W.*, 445 F.3d 1147, 1151 n.1 (9th Cir. 2006) (citations omitted), *abrogated on other grounds by Schindler Elevator Corp.*, 563 U.S. 401 (2011). Nor is it required that the *qui tam* suit "precisely repeat" the information publicly available. *U.S. ex rel. Rosales v. S.F. Hous. Auth.*, 173 F. Supp. 2d 987, 996 (N.D. Cal. 2001). Instead, it is enough to trigger the jurisdictional bar when prior public disclosures "contained enough information to enable the government to pursue an investigation into them." *See id.*

Relator claims that there has "never been a public disclosure that Harvard defrauded the federal government in the Clery Act program." Dkt. No. 29 at 3. But this assertion is beside the point. "The substance of the disclosure . . . need not contain an explicit 'allegation' of fraud, ***so long as the material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain***." *U.S. ex rel. Found. Aiding The Elderly v. Horizon W., Inc.*, 265 F.3d 1011, 1014 (9th Cir.)

[6] Likewise, Relator does not attempt to dispute that Harvard's Clery Act reporting data is a source that falls within the statute. Dkt. No. 29 at 10. Indeed, Courts have held that a "publicly-searchable database" available on a government website, that provided and synthesized data from many different reporting agencies, such as the Clery Act website, was an "administrative report" subject to the FCA's public disclosure bar. *See U.S. ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*, 739 F. Supp. 2d 396 (S.D.N.Y. 2010); Department of Education, "CSS-Campus Safety and Security," *available at* https://ope.ed.gov/campussafety/#/ (last accessed August 21, 2017).

(emphasis added), *opinion amended on denial of reh'g sub nom.*, 275 F.3d 1189 (9th Cir. 2001). Even if this Court accepts Relator's flimsy allegations of a false claim, the material elements of the fraudulent transaction were in the public domain: the alleged hacking was mentioned in *The Crimson* article in 2003 and Harvard's 2003-2004 Clery Act disclosures were freely disclosed on the Internet. And as for the alleged burglaries, the only source Relator cites is a book that he admits is a work of "fiction." *See* Compl. ¶¶ 32-33 and Dkt. No. 29 at 5, n.1.

Courts routinely dismiss *qui tam* actions where, as here, the elements of the alleged fraud have already been made public. *See U.S. ex rel. Longstaffe v. Litton Indus., Inc.*, 296 F. Supp. 2d 1187, 1194 (C.D. Cal. 2003) (identifying additional details about the alleged fraud was not sufficient where the "media coverage put the public on notice as to each of the broad categories within which [*qui tam* plaintiff's] details fall"); *U.S. ex rel. Hansen v. Cargill, Inc.*, 107 F. Supp. 2d 1172, 1181 (N.D. Cal. 2000) (rejecting plaintiff's contention that the public disclosure bar did not apply because the details of the allegations had not been disclosed); *Rosales*, 173 F. Supp. 2d at 996 ("Although all of the purported *means* by which the [Defendant's] fraud was perpetrated may not have been commonly known, the prior public disclosures contained enough information to enable the government to pursue an investigation into them. This is enough to trigger the jurisdictional bar."). Relator's alleged ability to "read between the lines" does not save the claim, and the authority he cites is not to the contrary. *See* Dkt. No. 29 at 10 citing *U.S. ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 579 (9th Cir. 2016) (Relator's claim based on "genuinely new and material information of fraud" was not barred by public disclosure bar).

3. Relator is not an "original source" of the information.

Since Relator's *qui tam* action is based on publicly disclosed information, his claim must be dismissed unless he can demonstrate that he is the "original source" of the information. Under the pre-2010 FCA statute, which applies here, Relator must show he "has direct and independent knowledge of the information on which the allegations are based." 31 U.S.C § 3730(e)(4)(B) (1986 ed.).[7] In his Response to the Court's Order to Show Cause, Relator claims that he is an "original source" because he determined the names of the three Harvard dorms that Zuckerberg allegedly burglarized. Dkt. No. 29 at 12. In addition, Relator claims he put in a significant amount of work reviewing the Clery Act records, "reverse engineering how Z obtained the missing information," and determining that a conspiracy had been entered into and a fraud committed against the federal government. *Id.* at 5, 12-13. None of these arguments are sufficient to qualify Relator as an original source.

The names of the specific dorms that were allegedly burglarized are not material facts. The *Crimson* article that Relator cites mentions that Harvard dorm websites had been hacked.[8] As in *Longstaffe*, Relator's identification of specific dorms that were allegedly hacked is a "detail [that] adds little where the media coverage put the public on notice" as to the broad allegation of the fraud. 296 F. Supp. 2d at 1194. In any event, even if there was value to the names of the specific dorms that were allegedly "burglarized," those names were all derived based upon review of public sources. Relator does not allege he had "direct and independent" knowledge of the dorm names.

Second, Relator's supposed ability to "piece together" a conspiracy does not qualify him as an original source. Dkt. No. 29 at 13. As the very authority Relator relies on states, a person must have "true knowledge, as opposed to guesswork or suspicion" to qualify as an original source. *See Prather v. AT&T, Inc.*, 847 F.3d 1097, 1104 (9th Cir. 2017) (cited by Relator at Dkt. No. 29 at 9); *see also Aflatooni*, 163 F. 3d at 525-26 ("Relator may not "maintain a qui tam suit based on pure speculation or conjecture "); *Malhotra*, 770 F. 3d at 860 ("generalized suspicion" did not constitute "knowledge"). Even so, "[a] relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed." *A-1 Ambulance*, 202 F.3d at 1245 (quoting *U.S. ex rel. Findley v. FPC–Boron Emps.' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997)). Relator has no "direct" or "independent" knowledge of the alleged facts underlying his claim and his arguments to the contrary fail to overcome this fundamental defect.

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[7] The 2010 amendment revised the original source requirement to require: "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C § 3730(e)(4)(B). Even if the 2016 allegations were properly pled, Relator has no independent knowledge of this discussion, as the entire allegation appears to be made upon "information and belief." Compl. ¶ 17. Under either version of the statute, Relator fails to meet the requirements of an "original source."

[8] *See* Katherine Kaplan, "Facemash Creator Survives Ad Board," (November 19, 2003) *available at* http://www.thecrimson.com/article/2003/11/19/facemash-creator-survives-ad-board-the/. Relator cites this article from *The Crimson* in Paragraph 13 of the Complaint.

B. Relator's claim is barred by the statute of limitations.

Relator's claim is barred unless it was filed "(1) six years after the date on which the FCA violation is committed or (2) three years after the date when facts material to the right of action are known or reasonably should have been known by the *qui tam* plaintiff, whichever occurs last. A suit under the Act must, in any event, be brought no more than ten years after the date on which the violation occurred." *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996); 31 U.S.C. § 3731(b).

Here, aside from a single trivial allegation discussed below, all of the events alleged in Complaint took place from 2003-2004.[9] Any FCA claim related to these events had to be filed no later than 2014. Relator did not file this action until February 2017—approximately **fourteen years** after the alleged violation initially occurred and **three years** after the statute of limitations expired.

In the Complaint, Relator attempts to avoid this limitation by relying on two "tolling" theories. First, Relator claims that under the last overt act doctrine for

[9] Although not alleged, it is likely that Harvard actually filed its Clery Act report for 2003 sometime in 2004. Even with this assumption, the limitations period has still expired.

conspiracies, the statute of limitations will not be triggered until the last overt act in the alleged conspiracy—the payment from Mr. Zuckerberg to Harvard—is completed. Compl. ¶¶ 18, 27. Second, Relator claims that "confidentiality agreements" entered in unrelated court cases prevented his discovery of facts related to the claim. *Id.* ¶¶ 19-24, 26-28. Neither theory saves Relator's claims.

1. The last overt act doctrine does not toll the statute of limitations.

Relator contends that the statute of limitations for his conspiracy claim has not started to run because the last overt act in the alleged conspiracy—the payment from Mr. Zuckerberg to Harvard—has not yet occurred. Compl. ¶ 18. But, in the Ninth Circuit the limitations period for civil conspiracies runs separately for each alleged overt act in the conspiracy. *Gibson v. U.S.*, 781 F.2d 1334, 1340 (9th Cir. 1986).[10] Relator alleges that the "overt acts" in the conspiracy consist of three "burglaries" that occurred in 2003 and Harvard's failure to report them on its Clery Act disclosures that year. Setting aside the implausibility of these allegations, all of the "overt acts" of the alleged conspiracy occurred in 2003-2004. The only allegation that goes beyond this time period is a reference to a "negotiation" between Zuckerberg and Harvard regarding a possible donation, which has not even occurred. Compl. ¶ 17. But, as discussed, *supra* II.A.1, this allegation is nowhere close to meeting the particularity or plausibility requirements necessary to plead an overt act in a conspiracy to commit fraud. There are no allegations of the "who, what, when, where, [or] how" of this supposed meeting. *Ebeid*, 616 F.3d at 998. Relator does not even allege the purported amount of the donation discussed, who attended the meeting, or when (if ever) this donation will be paid. And, it is

[10] Courts apply the "prevailing law" in the Circuit the case is filed to determine the statute of limitations for an FCA conspiracy. *See e.g. U.S. ex rel. Griffith v. Conn*, 117 F. Supp. 3d 961, 987 (E.D. Ky. 2015) ("Thus, the question here is whether the Sixth Circuit follows the last overt act rule for civil conspiracies."); *U.S. ex rel. Fisher v. Network Software Assocs., Inc.*, 180 F.Supp.2d 192, 195 (D.D.C.2002) (applying the "the prevailing law in this circuit" to determine limitations period for conspiracy).

completely implausible that any meeting between Zuckerberg and Harvard was part of an on-going conspiracy. It is nonsensical that Harvard failed to report "burglaries" in the anticipation that one day Mr. Zuckerberg would be a success, but then waited thirteen years to even discuss the financial benefits that supposedly motivated the entire scheme. Indeed, these "financial benefits" are not even alleged to have been paid.

In any event, even if Plaintiff's "negotiation" allegation could survive Rule 8(a) and Rule 9(b), Relator fails to allege that this "discussion" caused any damage—a necessary element. *Gibson*, 781 F.2d at 1340 ("the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff"). Finally, if Relator's theory is permitted, it would gut the statute of limitations of any force because a party seeking to avoid a limitations period could simply plead—as Relator does—that there is an ongoing conspiracy and the "last overt act . . . has not occurred yet" and will not occur until some future date. Compl. ¶ 18. Since Relator has not adequately alleged any overt act within the limitations period, his § 3729(b)(1) conspiracy claim is time barred.

2. Confidentiality agreements in unrelated lawsuits do not toll the statute of limitations.

Under the FCA tolling provision, an action must be filed within three years after the date "facts material to the right of action are known or *reasonably should have been known* by the *qui tam* plaintiff." *Hyatt*, 91 F.3d at 1218 (emphasis added). This equitable tolling provision allows the statute of limitations for FCA claims to be tolled in circumstances where material facts are concealed from the *qui tam* plaintiff, preventing the timely filing of an action.

Relator claims, on "information and belief," that the "confidentiality agreement[s]" in lawsuits filed by Cameron and Tyler Winklevoss and Paul Ceglia against Mr. Zuckerberg blocked the public release of Zuckerberg's student files and shielded material information related to the burglaries. Compl. ¶¶ 19-21.

Under Relator's theory, the existence of the "confidentiality agreement[s]"—which appear to be nothing more than standard protective orders entered in nearly all litigation—toll the statute of limitations for the period from when the Winklevoss action was filed—September 2, 2004—until the date the Ceglia action was dismissed—March 25, 2014. Compl. ¶ 22. Relator's reliance on these unrelated lawsuits is unavailing.

First, Relator has nothing but sheer speculation to support his allegation that Mr. Zuckerberg's student records were produced in those cases, much less that the records contained allegations of burglaries. This falls woefully short of Rule 9(b)'s requirements.

Second, even if the records were suppressed, as alleged, they are immaterial to Relator's ability to pursue his lawsuit. After all, any confidential documents produced under a protective order in those lawsuits remains confidential to this day. Nonetheless, Relator has managed to file this lawsuit.

Third, Relator's Complaint is not based on any information that was revealed once the second lawsuit was dismissed. Indeed, Relator does not allege *any material facts* that were revealed after the lawsuit was dismissed.

Instead, the "material facts" alleged in the Complaint are all derived from a movie that was released in October 2010, a book that was released in July 2009, data from Harvard University that has been available since at least 2004, a Harvard *Crimson* article written in 2003, and a federal statute that has been in effect since 1990. Based on the allegations in the Complaint, the latest possible date that triggers the three-year tolling period is October 2010—the date the Social Network movie was released. Relator then had until October 2013, at the latest, to file this action. Relator did not file until February 2017, more than four years after the limitations period expired. This action must be dismissed.

C. Relator fails to plead a violation of the False Claims Act against the Facebook Defendants.

Even if Relator's claims were not barred by the public disclosure bar and the statute of limitations, the Complaint fails to state any claim and must be dismissed. *First*, the allegations in the Complaint rely on broad, categorical allegations against all "Defendants." Compl. ¶ 38. But beyond the conclusory allegation that Mr. Zuckerberg committed "burglaries" and discussed a possible donation with Harvard, there are no specific allegations regarding what any specific defendant allegedly did—certainly nothing that would satisfy Rule 9's heightened pleading requirement. *Second*, Relator's conspiracy to commit an FCA violation theory fails because the Complaint does not allege the commission of an unlawful act or an agreement—necessary elements for a conspiracy claim. *Third*, even if Relator could surmount these barriers, Harvard's violation of a Department of Education regulatory provision, such as the Clery Act, is not a false claim under a false certification or promissory fraud theory.[11]

1. Relator fails to plausibly allege any Facebook Defendant committed any violation of the False Claims Act.

Relator alleges that *all* Defendants "knowingly presented a false or fraudulent claim for payments or approval by certifying Harvard was in compliance with the Clery Act" and *all* Defendants "made a false record or statement that was material to a false or fraudulent claim because they certified there were no burglaries at the Harvard campus in November 2003." Compl. ¶ 38. This "formulaic recitation" of the elements is unsupported by any factual

[11] In addition, as discussed in Harvard's Motion to Dismiss and incorporated by reference as if stated herein, the Clery Act immunizes institutions of higher education from civil liability, barring Relator's suit. *See* Harvard Memorandum in Support of Motion to Dismiss at 4-6. Likewise, Relator has not alleged any failure to disclose because the "burglaries" were never alleged to have been reported to the campus police department or other campus security authority. *Id.* at 6-7 (incorporated by reference as if stated herein); 20 U.S.C. § 1092(f)(1)(F)(i) (disclosure obligations are triggered when there is a "criminal offense[]" that is "reported to campus security authorities or local police agencies").

allegations. *See Iqbal*, 556 U.S. at 678.

First, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007) (internal quotation marks and alterations omitted). Thus, a Complaint must be dismissed when it "fails to set forth each individual's alleged participation in the fraudulent scheme." *U.S. ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 998 (9th Cir. 2011). Here, the Complaint fails to specify in any detail precisely what each individual defendant did that would give rise to a claim of liability. For this reason alone, the Complaint should be dismissed under Rule 9(b).

There are no allegations that any of the Facebook Defendants "certified" any kind of statement or claim on behalf of Harvard to the federal government, and such a claim would be facially implausible given their status as students in 2003 and 2004. There are no allegations that any Facebook Defendants knew such a certification was made by Harvard, and certainly no allegations that any individual Facebook Defendant "caused" Harvard to make such a claim. There are no allegations that any Facebook Defendant had any knowledge of the Clery Act, of Harvard's reporting requirements under the Clery Act, or that Harvard's receipt of federal funds was tied in any way to its Clery Act reporting obligations. Of course, because Facebook did not exist in 2003, it could not possibly have had any relevant knowledge or engaged in any conspiracy. The Complaint fails to meet Rule 8(a)'s plausibility requirement, and certainly fails to meet Rule 9(b)'s heightened pleading standard for fraud. *See Lee*, 655 F.3d at 998 (affirming dismissal when the Complaint fails to allege "Individual Defendants had any role in making a false statement to the United States government").

2. Relator fails to plausibly allege a conspiracy to commit a False Claims Act violation.

Relator brings a conspiracy claim based on the allegation that "Defendants engaged in a conspiracy to block the release of the information on the burglaries and the computer hacking of protected computer systems." Compl. ¶ 38. But to state a claim for "conspiracy" under Section 3729(a)(3), Relator must allege Defendants entered into an agreement to injure the United States Government through an unlawful action, i.e., a violation of the FCA. *See U.S. ex rel. Kelly v. Serco, Inc.*, No. 11CV2975 WQH-RBB, 2014 WL 4988462, at *11 (S.D. Cal. Oct. 6, 2014), *aff'd sub nom.*, 846 F.3d 325 (9th Cir. 2017) ("civil conspiracy" in the FCA context is "an agreement between two or more persons to injure another by unlawful action"). Although an express agreement is not required, Relator must allege "a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Id.* Relator's Complaint fails meet at least two of the elements of the claim, and must be dismissed.

First, Relator has failed to adequately allege any unlawful action, i.e., a violation of the FCA. Relator claims two violations of the FCA—false certification of compliance with the Clery Act and the false statement that zero burglaries occurred on the Harvard campus in 2003. But, both claims depend on the sufficiency of the underlying factual allegations that certain "burglaries" actually occurred. And as explained above, the burglary allegations are drawn from a book that Relator himself has admitted is a work of fiction. Relator's conclusory statement that three "burglaries" occurred fails to meet the heightened pleading standard for fraud. In any event, the few details that are alleged focus on "hacking," which is not required to be disclosed under the Clery Act. *See* 20 U.S.C. § 1092 (f)(1)(F).

Second, Relator has failed to allege any agreement between the Defendants to commit an unlawful action. There are no allegations that Harvard and the Facebook Defendants reached any kind of agreement regarding Clery Act reporting or disclosures. In fact, the Complaint alleges that Harvard acted alone in making the decision not to suspend Zuckerberg or report his actions because "it wanted a piece of this action." Compl. ¶ 15. There are no allegations that any of the other Facebook Defendants had any role or awareness of this decision. Indeed, the only allegations in the entire Complaint regarding Moskovitz and McCollum are that they were aware of the "burglaries," have earned money from Facebook, and assisted Zuckerberg with programming and coding. Compl. ¶¶ 15, 30. Such conclusory allegations fail to meet the particularity requirements for a conspiracy to commit fraud. *See e.g. U.S. v. Ctr. for Emp't Training*, No. 2:13-cv-01697-KJM-KJN, 2016 WL 4210052, at *6 (E.D. Cal. Aug. 9, 2016) (conclusory allegations of collaborating insufficient to state a claim).

3. Even if Relator could overcome these barriers, the Complaint fails to allege any False Claims Act violation.

Relator's claims, even if they were properly alleged, fail to meet the standards for a FCA violation. Relator advances two related theories—false certification (implied or express) and promissory fraud. Compl. ¶ 19. The allegations in the Complaint fail to state a claim under either theory.

Under an "implied certification" theory, a defendant "makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements." *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016). An implied certification theory may be the basis for liability when two conditions are satisfied: "[F]irst, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." *Escobar*, 136 S. Ct. at 2001.[12] Under a "false certification" theory, Relator must show "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006). Finally, promissory fraud requires "a false claim wherein the falsity is knowingly perpetrated and the underlying fraud is material to the government's decision to pay." *Campie*, 862 F.3d at 902. The Complaint does not state a claim under any of these theories and must be dismissed.

First, there are no allegations that Harvard made any "representations about the goods or services provided" on any claim for federal funds, as required under an implied certification theory. For example, in *Escobar*, the defendant submitted claims for payment using payment codes that corresponded to specific counseling services. By using the payment codes, the defendant implicitly certified that it had complied with the Medicaid requirements for that service, meeting the requirement that a representation about the goods and services provided. 136 S. Ct. at 2000-01. Here, there is no equivalent representation.

Second, the Relator has not alleged that the Clery Act qualifies as a "*material* statutory, regulatory, or contractual requirement[]" under *Escobar*—dooming his claim under any theory. A statute is "material" under the False Claims Act if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Escobar*, 136 S. Ct. at 2002 (quoting 31 U.S.C. § 3729(b)(4)).[13] "The materiality standard is demanding," as

[12] The issue of whether both conditions must be satisfied is currently pending on interlocutory appeal in the Ninth Circuit, *Rose v. Stephens Inst.*, No. 09-cv-05966-PJH, 2016 WL 6393513, at *3–4 (N.D. Cal. Oct. 28, 2016). Although the Ninth Circuit has yet to decide *Rose*, a recent Ninth Circuit opinion suggests that both conditions are a requirement for an implied certification claim. *See U.S. ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 902 (9th Cir. 2017) ("To succeed on such a claim, pursuant to *National Wholesalers* and *Escobar*, Gilead must not merely request payment, but also make specific representations about the goods or services provided.").

[13] The United States Supreme Court held that there was a materiality requirement for FCA

"[t]he False Claims Act is not an all-purpose antifraud statute." *Id.* at 2003. Whether a regulation is labelled a condition of payment of federal funds is relevant, but not necessarily sufficient. *Id.* In deciding whether a statute is material, the court "look[s] to the effect on the likely or actual behavior of the [Government]." *Id.* Thus, the court may consider whether "the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Id.* at 2003.

Relator has failed to allege that that the Government would not have given Harvard federal financial aid as a result of one supposedly inaccurate Clery Act report, and cannot do so as a matter of law. Relator does not allege that the Government conditioned *any* payment on any Clery Act submission. *See* Compl. ¶ 3. In any event, even if the Clery Act was an alleged condition of payment, that alone would not be sufficient to allege materiality if inconsistent with actual practice. *See Escobar*, 136 S. Ct. at 2003. And, Relator does not (and cannot) allege *any* instances where the Government has actually declined to provide federal funding as a result of a Clery Act violation. *See* Compl. ¶ 35 (discussing a fine). The single speculative assertion that the Government would not have paid "hundreds of millions of dollars in financial aid" if it knew of the violation is not sufficient to allege materiality. *See Ebeid*, 616 F.3d at 1000 (conclusory assertion that "United States would not have paid the claims" insufficient under Rule 9(b)). Relator's FCA claim must be dismissed under any theory of liability.

D. Relator's "Unjust Enrichment" claim must be dismissed.

The Complaint alleges "unjust enrichment" as a second cause of action, claiming that Facebook Defendants have unjustly benefitted at the expense of the federal government. Compl. ¶ 49. Recovery for a relator action under the False

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claims under the 1986 version of the statute in *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 665 (2008). The materiality requirement was explicitly incorporated into the text of the statute the next year. 31 U.S.C. § 3729(b)(4) (2009 ed.).

Claims Act, however, is governed by § 3730(d). *See* 31 U.S.C. § 3730(d) (relator may receive between 25-30 percent of the award recovered). A relator is not entitled to any additional independent award or recovery based on a FCA claim.

Even if Relator were asserting a stand-alone unjust enrichment claim unmoored from the FCA, Relator has not pled enough to state such a claim. To properly allege such a claim, Relator must allege, at a minimum, that he conferred some benefit to Facebook Defendants that was unjustly retained. *See Ohno v. Yasuma*, 723 F.3d 984, 1006 n.25 (9th Cir. 2013) ("The doctrine applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value.") (quoting *Hernandez v. Lopez*, 180 Cal. App. 4th 932, 938 (2009)). But, Relator has no standing to assert an unjust enrichment claim on behalf of the Government, and he has not alleged that he personally conferred any benefit to any of the Facebook Defendants.

V. CONCLUSION

For the foregoing reasons, Relator's Complaint should be dismissed. Because the Court lacks jurisdiction under the public disclosure bar and the claims are time barred in any event, the Complaint should be dismissed with prejudice. *See Frigard v. U.S.*, 862 F.2d 201, 204 (9th Cir. 1988) (dismissal with prejudice for lack of jurisdiction appropriate where claims cannot be asserted in another jurisdiction).

Dated: August 21, 2017

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